88-1487 (1)

Case No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED ~~STATES~~

October Term, 1988

Glen Rogers,
Petitioner,

v.

First National Bank of Peoria, et al.,
Respondents.

Petition for Writ of Certiorari of Glen Rogers
Defendant-Appellant, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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58 pp

Was Petitioner treated unfairly in hearings before a bankruptcy Judge; did he have his day in Court?

The questions raise issues of procedural "due process", "substantial rights", and "plain error" in civil proceedings.

They relate to happenings in an adversary proceeding in bankruptcy; facts of the hearing Judge branding Petitioner a liar, mistaking that he did not have a proper pleadings response on which to proceed, refusing to hear his counsel in argument and to allow presentation of and to give consideration to his claim -- in a setting of judicial abrasion, arrogance and intimidation.

List of Parties

A list of all parties appears on the cover caption of the Seventh Circuit Court of Appeals Case (see separate Appendix p. 1A); the parties in

controversy before the Court are as stated on page 1.

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Citation References To Lower Court Opinions

The opinion of the Seventh Circuit Court of Appeals entered July 7, 1988, case no. 87-1727 is officially reported at 851 F.2d 916.

The opinion of the District Court entered March 31, 1987, case no. 86-3021 is officially reported at 72B.R.280.

The opinion of the Bankruptcy Court Central District of Illinois, Peoria Division, entered February 6, 1985, case no. 84-0167, by Judge Lipkin is unreported.

Jurisdiction of this Court

Jurisdiction of this Court is invoked pursuant to 28 U.C.S #2101 and Supreme Court Rule 20,2 and extension of time in this case A-472 ordered by Justice Stevens December 13, 1988 to January

11, 1989 to file a Petition for a writ of certiorari to review:

1. Judgment of the Seventh Circuit Court of Appeals, entered July 7, 1988 and following an extension of time;

2. Order of the Seventh Circuit Court of Appeals, entered September 13, 1988, denying a petition for rehearing and suggestion for rehearing in banc filed August 16, 1988.

Jurisdiction in the Federal Courts Below

The United States Bankruptcy Court, Central District of Illinois, was the federal court of first instance and had jurisdiction pursuant to the Bankruptcy Code 28 U.S.C. #157 (b)(2), to conduct the adversary proceedings of this case

according to District Court Judge Mills in his opinion 3/31/87, pp. 4-7.

The United States District Court, Central District of Illinois, had jurisdiction of the appeal from the Bankruptcy Court based upon 28 U.S.C. #158.

The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. #1291.

Constitutional and Statutory Provisions

CONSTITUTION OF THE UNITED STATES

Bill of Rights

Amendment V

No person shall be... deprived of life, liberty, or property, without due process of law...

FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C. (Rules Volume) Rule 61

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Statement of the Case

This case relates to an appeal of an adversary proceeding in bankruptcy, which questions the decision by the bankruptcy judge, particularly the conduct of

the proceedings in reaching that decision. The judgment of the bankruptcy court was affirmed by the district court and by the Seventh Circuit Court of Appeals.

The primary issue of procedural due process to insure a fair trial relates to two hearings by the Bankruptcy Judge in an adversary proceeding instituted by the Respondent Bank.

At the first, August 20, 1984, the Judge referred to Petitioner as, "I know Mr. Rogers... and I don't believe anything he says." (Appendix 73A) He characterized Petitioner a liar without any reason for the outburst. He was not testifying; his attorney was attempting to make a point of argument.

The transcript of that hearing also shows the Judge goading attorneys, putting a time clock on the proceedings and refusing to hear arguments on pending motions having "made up his mind."

This injudicious conduct became exacerbated at the second hearing February 4, 1986, as that transcript discloses: (Vol. IR. Doc. 38), example (Appendix 77A-78A):

> Mr. Kellstedt: On behalf of Mr. Rogers who has, as Mr. Muller testified to today, an interest in the property and the proceeds and in that check since 1976 --
> The Court: He has no interest anymore because Mr. Radley's client got the money. You are out of order.
> Mr. Kellstedt: We are not out of order. We are a party to this lawsuit.
> The Court: I am not going to listen to you any more.
> Mr. Kellstedt: You have not considered the case of the claim of Mr. Rogers at all in this case.
> The Court: You didn't file the proper response.
> Mr. Kellstedt: I filed them. They are in the court records.
> The Court: I am not going to argue with you.
> Mr. Kellstedt: I wish to call it to your attention that you never considered fairly and fully Mr. Rogers' - The Court: I am not going to hear any more in this case.

There is nothing in the record except inference to support the statement of the Seventh Circuit Court of Appeals (pp. 4, 6 Opinion) that Rogers was not present at the February 4, 1985 hearing, and he did not testify, as the Judge made it clear that he would hear no more. The record except by inference does not read as the Court in its Opinion says (pp. 4, 6 Opinion), that Rogers' attorney was not present at the beginning and appeared later after the Bank had presented its judgment and lien evidence. The transcript heading (Appendix 75A, 76A) displays: "The hearing commenced at 1:30 p.m.... appearances:... Attorney James P. Kellstedt... on behalf of Glen Rogers."

The controversy which the Bankruptcy Judge arbitrarily terminated involved claims about a farm real estate transaction and rights to a check of $126,539.00 on which the Bank claimed a prior lien to

the extent of the Bankrupt Muller's interest. Petitioner claimed and the Bankrupt testified to a partnership interest in the land which "allegedly" was sold, the ownership of which had been in litigation in a state court for several years, the case pending for trial at the time of the bankruptcy. Also, if a sale was found, Petitioner asserted a half interest in the proceeds of the check, which the Bankrupt had held uncashed over a long period of time dependent on the outcome of the state court lawsuit. The Bank filed the adversary proceeding naming Petitioner and others Defendant who may have had claims against the check. Also the Bank had started a separate state court case on the check which was stayed by that Judge when the bankruptcy case commenced.

Petitioner says the history of misconduct of the Bankruptcy Judge which had

been criticized by lawyers, the press (Appendix 79A-93A) and ultimately by the Seventh Circuit Court of Appeals by its order of suspension (Appendix 94A) pending investigation followed by the next day resignation of the Judge, (Appeals Court Opinion p.7.), buttresses his position of violation of procedural due process and substantial rights, arising out of the incidents before and after referenced, examined both singly or in aggregate, based upon both his objections or "plain error" in a civil proceeding.

1. Judge Lipkin said Rogers could not be believed (1st hearing transcript p. 9);
2. Judge Lipkin mistook the pleadings situation and said that Rogers wasn't properly before the Court because he hadn't filed necessary pleadings (Appendix 77A). Rogers filed an Answer, Affirmative Defense and Counter-

claim and also a Motion to Dismiss (Record Vol.I. Doc. Nos. 10 and 11 filed July 23, 1984). It was the Bank which filed no pleading response in disregard of Rules 7(a), 8(d) and 12 of Federal Rules of Civil Procedure that there shall be a reply to a counter-claim.

3. There were seven parties and/or their attorneys in a hearing which had been scheduled for an hour, an impossible time scheduling approach in view of the nature of the issues, the number of parties and the supposed right to be heard and present evidence. And Judge Mills indicated that the Judge may have "gone too far in trying to hurry the proceeding along" (p. 15 of his Opinion);

4. Rogers' attorney was not heard, and the Judge denied him opportunity to fairly and fully present Rogers' case (2nd hearing transcript pp. 49-54);

5. The Court did not even offer to hear or request final or summary argument at the complicated second hearing before his hasty oral ruling and then wouldn't hear anymore (2nd hearing transcript pp. 49-54);
6. Notice of second hearing did not designate trial, there were no pre-trial conferences, no proper waiver of and no jury trial as had been requested; the state court case issues were ignored (Vol.I.R., Doc.26 and record and transcripts);
7. At the two hearings, the Judge badgered the attorneys and the witnesses (see both hearing transcripts and second hearing transcript Tpp. 27-28, 43, 49-53);
8. At the two hearings of the case, Judge Lipkin asked for, was guided by and placed special reliance on the wisdom and requested recommendations of the

attorney for the Bank, to the exclusion in most instances of the other attorneys and parties (1st transcript August 20, 1984 hearing, RI Doc. 17, pp.6-11), and 2nd transcript February 4, 1985 hearing, RI Doc. 38, pp. 9, 50-52).

The Opinion of the Circuit Court of Appeals concedes that the trial at the bankruptcy level "was not a model proceeding and left much to be desired", (p. 7 Opinion). The Court referring to the Judge's "well-known record of abrasive and unfair treatment of attorneys" (p.7 of Opinion), says "that such a state of affairs did exist and was most unfortunate," and points out that when the Circuit Council of the Court addressed the issue and ordered a suspension, Judge Lipkin promptly resigned. The Court admits that the bankruptcy trial "was difficult for all concerned and it regretted the necessity of lawyers

having to practice in an unpleasant and difficult atmosphere," such as that which existed in Judge Lipkin's Court (p.9 of Opinion.)

Likewise, the District Court Judge in his opinion (p.p. 15,16) condemned the conduct of the Bankruptcy Judge, saying that both the hearings were in a manner that he "in no way condones," and opinion (p.11), that the due process rights of Petitioner to a fair trial against the Bankruptcy Judge's comments and conduct raised "a troublesome issue in this Appeal," and opinion (p.p. 14,15) that the Judge's remarks of Rogers during the first motion hearing and his comments and treatment of Rogers and the attorneys during the final hearing "were indeed regrettable and unworthy of praise," and "the judge may have gone too far in trying to hurry the proceeding along."

Argument

"Doth our law judge any man, before it hear him, and know what he doeth?" (Bible, New Testament, Book of St. John Ch.7, Verse 51.)

ARGUMENT A - PROCEDURAL DUE PROCESS

That's what the Bankruptcy Judge did to petitioner; he judged before and without hearing him and knowing.

The litigant was denied due process; he was "in fact treated unfairly". (Margoles v. Johns, 660 F. 2d 291, 296, (7th cir., (1981))

Missing essentials of due process include:

1. A neutral and detached magistrate; (U.S. v. Sciuto, 531 F. 2nd 842, 845 7th cir. (1976)); Coolidge v. New

Hampshire (1971), 403 N.S. 443, 449; In Re Murchison (1955) 349 U.S. 133, 134; Dartez v. Fibreboard Corp. (1985) 765 F.2d 456, 471, 473, 5th cir.);

2. An atmosphere of impartiality, without the fatal appearance of unfairness, bias, or prejudice; (American Constitutional Law by Tribe, Foundation Press, pgs 500-513, particularly 503, 508, 512, Nordmann v. Nate Hotel Co., 425 F. 2d 1103, 1109, 5th cir. (1970); U.S. v. Singer (1983) 710 F. 2d 431, 436-438, 8th cir; Murphree v. Raybestos - M Inc. (1982) 696 F. 2d 459, 464, 6th cir.;
3. An orderly proceeding; (City of Chicago v. Cohen) 326 Ill. 372, 374-375, 158N.E.118)
4. "The opportunity to defend ones self and to present reasons... why a proposed action is unwarranted: (Cleveland Bd. of Ed. v. Laudermill (1985),

470U.S. 532, 546; 105 S.Ct. 1487, 1495-1496; (American Constitutional Law by Tribe, Foundation Press, p.p. 500-513, particularly 503, 508, 512.).

As stated in the Petition for Rehearing before the Seventh Ciruit Court:

The Record indicates the Judge accelerated the time procedure of the February 4, 1985 hearing in his irritation of any potential trial interruptions. He constantly referred to other people and their attorneys waiting to go with their cases, which he apparently had scheduled for 2:30 p.m., less than an hour after the hearing in question was commenced. He talked about getting on with it and badgered attorneys and witnesses.

Rogers' attorney had no thought that the Judge was going to enter a final order without normal approaches to the other parties and each of their attorneys on whether they had any evidence or any

points to raise or any arguments to make, when he suddenly said, like in one breath and no time break between question and ruling,

> "What else is there, gentlemen? I think under the evidence Mr. Radley has a valid lien on this check. I want Mr. Radley to prepare an order to that effect". (2nd hearing transcript, Doc. 38, T50)

He did not announce or clarify as he should have, the extent of the lien or that it extended only to Muller's interest in the check or that Rogers' interest in the check still was to be determined.

The Judge said the above quotation after he had just admonished the attorney for Rices and hinted he didn't need to hear more testimony while Rice, no questions having been asked of him, was still in the witness chair (T 49-50). The Judge didn't ask the question individually of each attorney or party who had

not yet offered evidence or testified or give anyone time to answer before ruling. He had asked the Bank's attorney to "put on a witness" (T 9), allowed the Rices' attorney to call witnesses (T 24, 28, 43), and then badgered their attorney Church when he called Rice to the stand (T 49-50). The Judge did not ask the attorney for the Trustee, the attorney for Mullers - the bankruptcy petitioners, or the attorney for Rogers if they then wanted to present evidence.

The Judge offered no one the right or opportunity to summarize or give final argument.

The Judge refused to hear Rogers' attorney who addressed the Court:

> "On behalf of Mr. Rogers who has, as Mr. Muller testified today, an interest in the property and the proceeds and in that check, since 1976 --"

instead interrupting and breaking in with:

> "You are out of order. I am not going to listen to you anymore." (T 53)

Upon being told he hadn't considered the claim of Rogers at all, the Judge replied:

> "You didn't file the proper response." (T 53)

Rogers' pleadings, a motion, answer, affirmative defense and counter-claim, as we have stated before, had been timely filed and were in the Court file (see RI Docs. 10, 11), to which, in fact, the Bank had not filed a responsive pleading. The Court shut off all further objection and communication, emphatically interrupting the attorney:

> "I am not going to argue with you. I am not going to hear anymore in this case." (T 53)

The bankruptcy Judge's brusque refusal to hear further, coupled with his prejudice against Rogers, undoubtedly affected the outcome and denied due process. The district court recognized that more than one permissible inference was contained in the facts adduced at the abbreviated hearing. Indeed, the bankruptcy Court had a curious set of circumstances before it, namely: (1) a real estate sale in which a warranty deed is issued over two years prior to payment of the sale price: (2) a check for 126,539 issued to people in obvious financial straits who had refused to cash the check for over four years; (3) a real estate transaction and purported silent partnership which was the subject of a state court action which had been pending over three years at the time of the hearing. The bankruptcy judge made no attempt to fully educate himself regarding the

interplay of these curious circumstances.

The Judge, thus, foreclosed Rogers without direct evidence of his claim and a fair hearing.

Before the claimed procedural due process errors can be held harmless, the reviewing court must be able to believe that they were harmless beyond a reasonable doubt. (Chapman v. State of Cal, (1967), 386 N.S.18, 17L.Ed 2d 705, 87,S. Ct. 824, rehearing denied 386.U.S. 987; also Henry v. Williams, D.C. Mass (1969) 299F. Supp. 36; Ganger v. Peyton, C.A. Va. 1967, 379F. 2d 709.) Neither the District nor the Circuit Court seem to have considered or applied this test which leads to a different result.

ARGUMENT B - PLAIN ERROR DOCTRINE

The Seventh Circuit should recognize and apply the plain error standard to civil proceedings and should have to this case.

The Appeals Court said in its Opinion, p. 6:

> "It is dubious whether this Circuit recognizes plain error in a civil proceeding".

Although the Appeals Court went on, Opinion, p. 6:

> "If invocable at all, 'only in most exceptional circumstances we will allow a civil appellant to make a nonjurisdictional argument for the first time on appeal...Walker v. Maccabes Mutual Life Insurance Co., 753F. 2d 599, 602 (7th cir. 1985). We are not persuaded that this case, represents an exceptional circumstance."

Other Circuit Courts of Appeal have recognized the doctrine and have applied it. It has been invoked in cases where the circumstances are not as exceptional

or no more exceptional than petitioner's case.

In Newman v. Staley Mfg. Co., 648 Fed. 2d 330, 334-336 5th Cir. (1981), the Court using the plain error standard in part reversed for prejudicial remarks of a Judge which favored one party. The Court said, p. 355:

> "When a timely objection was made at trial, we will inquire whether a remark impaired a substantial right of the objecting party. Fed. r. Civ. Pr. 61. When a timely objection was not made at trial, however, appellate review is not precluded. 'Where a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial, the absence of objections will not preclude our review since counsel will be loathe to challenge the propriety of a trial judge's utterances for fear of antagonizing him and thereby prejudicing a client's case.' Miley v. Delta Marine Drilling Co., 473 F. 2d 856, 857-58 (5th Cir.), cert denied, 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973). Although not precluded, appellate review is limited to review

> for plain error. E.g., Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980). At trial Staley timely objected to some of the allegedly improper comments of the trial judge; we will accordingly review these remarks to ascertain whether they affected a substantial right. Staley did not object to other allegedly improper statements, and our review of these statements is limited to our review for plain error. Of courseeven though our review of the individual remarks will be governed by two standards, in evaluating the effect of the comments we must consider the record as a whole."

The courts recognize in situations of no objections, that counsel may be reluctant or frustrated to question a trial judge's remarks or conduct for fear of antagonizing him or prejudicing the client's case (Agee v. Lofton, 287 Fed. 2nd 709, 710 (8th Cir. 1961); Champeau v. Fruehauf Corp., 814 Fed. 2nd 1271, 1276 (8th Cir. 1987). The "plain error" approach resulted in reversal of the

trial judge for "unfortunate remarks" in the Agee case, the Court saying, p. 710:

> "Exceptions should, no doubt, have been taken at the trial to the objectionable remarks of the judge; but counsel, in a trial such as this, are, understandably, loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case. This Court, regardless of the absence of objections or exceptions, may notice plain error, and is under obligation to see that trials in the district courts are conducted impartially and that they are not without some measure of dignity and decorum."

As the Court said, p. 651, in Hamm v. Members of Bd. of Regents of State of Fla., 708 F.2d 647 (1th Cir. Court of Appeals 1983), where Plaintiff failed to invoke the recusal or disqualification statutes, but the Court reviewed on the plain error standard.

> "The Plaintiff in this case invoked neither statute in the district court so that the plain error standard of

> review applies here. Cf. United States v. Schreiber, 599 F.2d 534, 535 (3rd Cir.), cert. denied, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979).

There the Court held, after revieww of the issue on the merits, that the Judge;s conduct did not constitute "pervasive bias" necessary to reverse. The Court did not use technical or procedural gounds not to review, but reviewed on the merits, even if ultimately holding against the appellant.

A reviewing court may recognize plain and prejudicial or harmful or fundamental error of its own volition. (Ramsey v. Travelers Insurance Co., C.A. S.Car. 1963, 317 F.2d 300; also see Nimrod v. Sylvester, C.A. Mass 1966, 369 F 2d 870; Blier v. U.S. Lines Co, C.A. N.Y. 1961, 286 F2d 920, cert. denied, 368 U.S. 836.)

ARGUMENT C - HOW FAR MUST AN ADVOCATE GO TO CHALLENGE A JUDGE!

An advocate must be allowed reasonable discretion to determine the extent of challenge and objection to an abrasive Judge in an atmosphere of trial prejudice.

The Appeals Court indicated that Counsel has not gone far enough, saying,

> "Had Rogers' counsel done more for his client there, then we, too, might have been able to do more for him here" (p. 7 of Opinion).

At what level of exposure to prejudice should counsel advocate? Rogers' attorney, a contemporary of Judge Lipkin, knew about his health and temperament problems. A general practitioner with other clients, as well as Rogers, coming before the Court, he was frustrated.

The lawyer should not be required to perform a useless act of procedure against the mind-set of a Judge Lipkin and risk further antagonism.

Examine (Appendix 77A) and note how the Judge interrupted him, before he could finish a first sentence and yelled emphatically he wouldn't listen to him anymore. This was a no chance offer of proof situation.

An offer of proof need not be made, to protect the record, where it appears from the context of the trial and the attitude of the Judge that it would be denied. In the case at bar, the Judge wouldn't even hear the attorney (T 53).

An extremely hostile attitude on the part of the trial judge will excuse the making of an offer. (Giddy v. Williams, 336 III. 482, 169 N.E. 514).

How far must counsel go? This Appeals Court said,

- "that Judge Lipkin had a publicly well-known record of abrasive and unfair treatment of attorneys" (p. 7 of Opinion).

Rogers' attorney had faced contempt charges in advocating a client's cause. He was not timid to stand up for his client. See Smith v. Georgia-Pacific et al., Appeal of James P. Kellstedt, 76 III.App.3d 667, 395 N.E.2d 214 (1979), reversing a direct criminal contempt judgment against the attorney, the Court saying, p. 217 N.E. 2d citation:

> "Counsel was merely overzealous in the presentation of his case."

To describe Rogers' attorney's remarks as scolding the Judge after he'd made his decision does not fit (T 53)! At the time of the surprise oral ruling, without putting in his case -- no testimony, exhibits or arguments -- for Rogers, the attorney did not anticipate any decision, and after it, his attempted

remarks were purposed to move on, give Rogers his day like the Bank and Rices had. He rejects the notion that by calculated risk he took a chance, "to stand by" versus "confrontation", as a trial tactic which lead to not preserving the record. It does not square with his trial background and experience.[1]

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[1]Roger's attorney has spent over forty years in practice as an advocate, his first three years with a Chicago law firm, before opening law offices in his hometown which he has been operating as a senior partner and individually ever since. At the age of 30 he was Public Defender of Peoria County, and at age 33 was elected State's Attorney. He also is a licensed member of the Bar of the Commonwealth of Massachusetts, after taking that bar examination in 1979 at age 61. He is experienced in all kinds of litigation, criminal, civil and tort, in various levels of trial and appellate courts and administrative agencies.

The Appeals Court in its Opinion, perchance in drollery, kindly says, footnote 1, pp. 7-8, Rogers' lawyer "demonstrated his commendable ability as a seasoned practitioner to be fully heardxxx". The attorney knew, particularly in this case with complex issues, that unless he put in evidence by and for his client, he absolutely had no chance to win.

The propriety of not making a timely objection for fear of antagonizing a Judge and prejudicing the client's case has been acknowledged in Newman v. Staley Mfg. Co., 648 F.2d 330, 334-336 (5th Cir. 1981); Champeau v. Fruehauf Corp., 814 F.2d 1271, 1975-1277 (8th Cir. 1987); Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1962); Miley v. Delta Marine Drilling Co, 473 f.2d 856, 857-858 (5th Cir.), cert. denied, 414 U.S. 871 (1973).

ARGUMENT D - SUBSTANTIAL RIGHTS FEDERAL CIVIL PROCEDURE (RULE 61)

When a timely objection is made, the Court said in, Newman v. Staley Mfg. Co., (pp. 334-336), previously cited here in Argument B of the Petition, that we will inquire whether a trial judge's remarks or conduct impaired a substantial right of the objecting party. Timely objections of a general nature were made at the motion hearing to the Bankruptcy Judge's characterization of Petitioner as "not to be believed." The same is true about the remarks and conduct of the Judge at the second and final hearing, particularly as reflected in the transcript (Appendix 77-78A) where objection and entreaty were proffered by counsel in behalf of his "not to be believed" client. Is there any reasonable doubt that

these cumulative actions affected Rogers' substantial rights? (See Rule 61, Brief, ante ps. 12-13.)

Attacks on the deportment of a judge should be weighed carefully. And verbal acts of a hearing court where not justified to the issues or to any improper conduct of counsel constituted prejudicial error. (Cromling v. Pittsburgh R. Co., C.A. Pa 1963, 327F 2d, 142.)

The leading case of McCandless v. United States of America, 298 U.S. 342-348, 346-348, 80L. ed. 1205, 1208-1209, refers to the present Rule 61 of "substantial justice" and held that an erroneous ruling denying an offer of proof which relates to the substantial rights of a party is ground for reversal. Rogers was denied an opportunity to present any argument or any evidence or offer of proof. The Judge said that's

all I'm going to hear, that's it. In the McCandless case there was error, in denying an offer of proof. In our case there is a substantial rights error, in denying opportunity to present any proof or argument.

Other "substantial justice" cases include:

Prejudicial material may so taint a case as to require a new trial (tape impeachment that jury may not have heard). White v. Cohen, 635 F2d 671 (1981).

Wrongful admission of testimony affected defendant's substantial rights. Reversed. Jordan v. Medley, 711 F2d 211 (1983).

Gratuitous remarks by witness for plaintiff. Reversed for defendant. "The only way the the defendant can be protected against the strong possiblility of

harm from the improper occurence at trial for which it was in no way responsible is by having a new trial." Beck v. Wings Field Inc., 622 F2d 114, 117 (1981).

Also see Conway v. Chemical Leaman Tank L. Inc., C.A. Tex. 1976. 525 F 2d 927, rehearing 540 F 2d 837, judgment substantially swayed by erroneous actions as a whole, and Williams v. Great Southern Lumber Co., 277 U.S. 19, 48S Ct. 417, and 72L. Ed. 761.)

ARGUMENT E - CUMULATIVE EFFECT

The "cumulative effect" of the errors mentioned beginning with reference to characterization of Rogers as not to be believed, all the way through the processing of the case, to the point at the end of the second hearing where the Judge tells Rogers' attorney that he is not

properly before the Court on the pleadings and says that I will not hear anymore from you, show the almost straight line of bias by Judge Lipkin to Rogers and may constitute plain error.

The review courts indicate that Petitioner had waived or not preseved his grounds of claimed defects in the proceedings which it considered as separate items of error. This does not get to the jist of Rogers' position. He makes reference to all these other happenings or errors as cumulative violations of the substantial rights and plain error standards, as mixed grounds of reversal, taken in entirety. The overall over activist conduct, in cumulation, of this Judge to this party exceeds the scope of judicial ethics, any Code of Judicial Conduct, substantial justice and due process.

See U.S. v. McClain, 823 F.2d 1457, 1462, 1468 (11th Cir. 1987), though a criminal case, the case is appropos on accelerated and discourteous trial management and that the "cumulative effect of the errors xxx denied the defendants their basic right to a fair trial under the plain error doctrine".

The holding of the Appeals Court in Newman v. Staley Mfg. Co., 648 F.2d 330, 334-336 (5th Cir. 1987), fits the case at bar. The Court reversed for prejudicial remarks of a Judge which favored one party. The Court said, p.p. 335, 6, in applying the two standards of Rule 61 and plain error:

> "Of course even though our review of the individual remarks will be governed by two standards, in evaluating the effect of the comments we must consider the record as a whole."

SUMMARY ARGUMENT AND RULE 17

REASONS FOR ALLOWING THE WRIT

The issues of this case; fair treatment, the right to be heard, to produce evidence in an orderly proceeding, before a neutral judge, procedural due process, substantial justice, application of the plain error doctrine in civil proceedings, fundamentally impact the day to day administration of justice.

Equal justice for all, means to protect and preserve the rights of the citizen against arbitrary judicial action.

These principles apply to Rogers as well as against Judge Lipkin and his proceedings. The proceedings were deficient, not due process of law; technically doubting it, as the review courts' opinions reflect, plausible middling, we do not condone and would have done it

differently, cannot equate with ultimate justice. (Montana Co. v. St. Louis M & M Co., 152 U.S 171.)

The easy out -hindsight, blame the attorney (who admits he is not without blunder), but in doing so, we affirm a procedure of misconduct and bias, and justice is undone.

The lower courts by upholding and Judge Lipkin by conducting an erroneous trial have departed from the accepted and usual course of fair and due process proceedings. Albeit this is only part of a bankruptcy, an adversary proceeding, the hearing principles involved are special and important, and in their sanctioned departure there, beg supervisory reaffirmation here.

The writ of certiorari also should be granted; because this decision of the Seventh Circuit conflicts with decisions

of the other circuits such as the Fifth, Sixth, Eighth, and Eleventh, see cases cited before, on applying the plain error analysis to civil case issues, to refute the viewpoint expressed p. 6 of Opinion that:

> "It is dubious whether this circuit recognizes plain error in a civil proceeding such as the case here".

The insight of dissent of Judge Jolley, (5th cir. 1986, Reese v. Mercury M. Div. of Brunswick Coop, 793 F2d 1416, 1430-36, p. 1435) provides the right reason this Court should allow the petition:

> "I respectfully submit that if we truly believe that the federal courts are a forum where litigants may expect impartial, objective, fair and just proceedings; this case must be reversed."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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